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## The Existence, Function, and Legal Position of the Land Bank According to the Provisions of the Laws and Regulations

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**Abstract:** This article discusses the existence, function and legal position of the Land Bank after the Constitutional Court Decision and also examines the existence of Customary Land after the existence of the Land Bank Institution in Undang-Undang Nomor 11 Tahun 2020 Tentang Cipta Kerja. Where after the birth of Undang-Undang Cipta Kerja, there were several test applications submitted to the Constitutional Court and ruling on this formal test case, the Government was ordered to make improvements within a period of 2 years if within that period no improvements were made, then UU Cipta Kerja would become permanently unconstitutional and it was also not allowed to issue new implementing regulations relating to UU Cipta Kerja. UU Cipta Kerja is also reviewed in relation to licenses to use customary land of indigenous peoples, where indigenous peoples feel they are losing their rights because there are no legal remedies against business actors who use customary land as land for business without having to get approval from indigenous peoples.

**Keyword:** Land Bank, Customary Land, Job Creation Law

### INTRODUCTION

Land is a crucial component of the earth's surface and holds significant importance in people's lives. It is a fundamental human need, as humans require land for various purposes such as shelter, agriculture, social activities, and more. The functions of land in human life include providing a place to live, carrying out daily activities, cultivating plants, and serving as the final resting place for humans (Hajati, 2021).

In the context of national development to realize a just and prosperous society based on Pancasila and the 1945 Constitution of the Republic of Indonesia, land is also a major capital, both as a vehicle for implementing development and as a factor of production to produce trade commodities that are very necessary for increase national income (Hajati, 2021). Basic

provisions regarding land in Indonesia have been regulated in Law Number 5 of 1960 concerning Basic Agrarian Law or - commonly abbreviated as BAL. Based on article 33 paragraph (3) of the 1945 Constitution which states that "earth, water and air space including the natural resources contained therein are controlled by the state for the greatest prosperity of the people", then the state has the authority as stipulated in article 2 paragraph (2) BAL. The term "controlled by the state" in the BAL is meant to give authority such as Regulating and administering the allotment, use, supply and maintenance of earth, water and space; Determine and regulate legal relations between people and earth, water, and space; and Determine and regulate legal relations between people and legal actions concerning earth, water and space.

The mandate of article 2 paragraph (2) of the BAL is also often referred to as the State Controlling Right (HMN). HMN is not synonymous with the right to own. The state does not own land because the state exists after the people exist. HMN is the right of the people at the state level as the highest organization. Thus, the state does not have the authority to sell or mortgage land. In another sense, even though the state is given the authority to control land, it does not mean that the state owns land as reserve land which can be directly used at any time for various purposes. The land is still owned by the people or through a stipulation process if the land is free state land. Ownership of land by the state to be used as fixed assets through existing mechanisms and regulations related to its acquisition (Trisna & Sandela, 2021).

Another role of the government in land regulation with a minimal role is always left behind in terms of providing land for development. In providing land for various purposes, the government in its implementation is always constrained by the provisions or rules that apply to the government bureaucracy itself so that the acquisition of the desired land often lags behind the acquisition by private parties (Winati et al., 2022). Land acquisition for the availability of land apart from having to get support from the government also has to get the participation of the community who owns the land. This can be interpreted that the Government and landowners are actually collaborating to provide land for development. Currently, the institution the government is pursuing for land acquisition is through a land bank (Danendra & Mujiburohman, 2022).

The land bank can be interpreted as a mechanism for obtaining and reserve land for development purposes. In practice, this mechanism was initially initiated in the City of Amsterdam in the Netherlands in 1890 and then implemented in several cities in Europe, then in the 1970s it was also adopted in cities in the United States, China and Singapore (Candra & Khaidir, 2020). The concept of land bank originates from two phrases, namely land bank and land banking. Land bank or land bank is defined as an institution or collaboration between institutions that has objectives related to land acquisition for national development. Meanwhile, land banking or land banking is defined as an instrument used to explain activities related to land banking (Danendra & Mujiburohman, 2022).

The phrase land bank encompasses the following definitions: "Land banks are government or non-profit entities that collect, temporarily manage, and dispose of vacant lan" and "Land banks are public authorities that engage in land banking exclusively." Furthermore, Jack Damen defines land banking as the structural acquisition and temporary management of land in rural areas by an impartial state agency in order to redistribute and/or lease out this land in order to improve the agricultural structure and/or to relocate the land for other purposes in the public interest (Al Zahra, 2017).

One of the targets of the 2005-2025 National Long-Term Development Plan (RPJPN) is infrastructure development to achieve optimal state service conditions. The existence of land banks in developed countries has been widely practiced. In the 2015-2019 National Medium-Term Development Plan (RPJMN), the government strictly implements the need to establish a land bank in Indonesia. Several notes in the substance of the Job Creation Law relate to the formation of a Land Bank, including the Land Bank Agency as a special state-owned agency with separated state assets. This means that the Land Bank Agency is in the form of a Legal Entity or a limited liability company that carries out its functions autonomously/independently. The Job Creation Law (also known as UUCK) is a form of omnibus law applied in Indonesia. Omnibus law is the concept of simplifying various legal products into one comprehensive legal product. Arrangements related to the Land Bank institution in the Job Creation Law are contained in Chapter VIII concerning Land Acquisition, Part Four concerning Land according to Articles 125-135 (Trisna & Sandela, 2021).

The Job Creation Law, which regulates the formation of a land bank, or in full, is called a land bank body, only referring to it as a special agency that manages land whose function is to carry out the planning, acquisition, procurement, management, utilization and distribution of land. The implementing regulations for this Job Creation Law, namely Government Regulation Number 64 of 2021 concerning Land Bank Agencies (also refers to PP Land Bank), which came into effect since promulgation on April 29, 2021 (Lahilote et al., 2021), stated that the Land Bank Agency, hereinafter referred to as the Land Bank, is a special agency (*sui generis*) which is an Indonesian legal entity formed by the central government which is given special authority to manage land. This means that the Land Bank can fully manage the land assets under its control to create a just economy. Full management is obtained because the assets of the Land Bank and financial system are separate from the state. Even though the Land Bank's financial system is separate from the state, under certain conditions there is a reporting system that must be completed first. For land and building assets that were previously government assets, a process of transferring and disposing of assets must be carried out based on the applicable rules and regulations (Arnowo, 2021).

The general objective of establishing a land bank is to provide land for development in the public interest so that development plans by the government and the private sector are not hampered. In addition, the objectives of the land bank from a governance perspective are to shape community regional growth, organize urban development, reduce land speculation, reduce repair costs by the community, and reduce public service costs due to development patterns (Ganindha, 2016).

The Land Bank is one of the important resource management tools to increase the productivity of land use. The method used in the land bank is market control and stabilization of local market land. The land bank guarantees the availability of land for various development needs in the future, efficiency of the APBN/APBD, reducing conflicts in the land acquisition process and reducing the adverse effects of land liberalization (Limbong, 2013). Land bank management relates to planning, organizing, implementing activities and supervising land bank activities in realizing the goals of the land bank. Supported by adequate regulations and strong institutions, land bank management can ultimately realize the six functions of a land bank, namely land collector (land keeper); as land security (land warrantee); as controller of land tenure (land purchase); as a land manager; as a land appraisal; and as a land distributor.

Conceptually, land bank activities must contain policies and strategies for optimizing the utilization and use of land (Limbong, 2013).

The sources of land that will be used as deposits in the land bank are lands that have been classified and inventoried by the authorized land agency (in this case BPN) and have land rights attached to them. These land sources include abandoned land, government asset land, erfacht land, absentee land, social facility land or public facility land, BUMN/BUMD asset land and confiscated land. The mechanism for changing land rights so that they become government assets is carried out through acquisitions or buying and selling, swaps, grants, revocation of rights and purchases at the State Asset Management and Auction Services Office (KPKNL) (Ganindha, 2016).

The form of accountability for a land bank according to Article 2 paragraph (3) is to be responsible to the President through a committee and regarding the assets of a land bank, it is state property that is separated and domiciled in the National Capital and can have representative offices throughout the territory of the Unitary State of the Republic of Indonesia.

Based on Article 3 paragraph (1) of Government Regulation Number 64 of 2021 concerning Land Bank Agencies, it is stated that there are 6 (six) land bank functions, namely: Planning; Land acquisition; Land procurement; Land management; Utilization of land; and Allocation or distribution of land.

In carrying out the functions referred to in paragraph (1), the land bank has the various task such as carry out long-term, medium-term and annual activity planning; carry out land acquisition which can be sourced from the determination of the government and other parties; carry out land acquisition for development in the public interest or direct land acquisition; carry out land management from development, maintenance and security, and land control activities; carry out land utilization through utilization cooperation with other parties; and carry out the distribution of land by carrying out activities of providing and distributing land.

Based on Article 6 of Government Regulation Number 64 of 2021 concerning Land Bank Agencies, the acquisition of land as referred to in Article 3 paragraph (1) letter b originates from: land determined by the government; and/or land from other parties.

The passage of Law No. 11 of 2020 concerning Job Creation on October 5 2020 (hereinafter referred to as the Job Creation Law) raises pros and cons. Of all the pros and cons, we need to examine together the purpose of passing the law from the perspective of agrarian law. According to the chairman of the Legislative Body of the DPR RI, there are several important points regulated in the Job Creation Law which are related to the Land Bank, namely accelerating agrarian reform, the government will accelerate agrarian reform and land redistribution which will be carried out by the Land Bank (Arrizal & Wulandari, 2021).

Apart from the pros and cons arising from the passing of the Job Creation Law, other pros and cons also arise from the issuance of Government Regulation Number 64 of 2021 concerning the Agency for Land Banks and Presidential Regulation Number 113 of 2021 concerning the structure and operation of the Land Bank.

Based on the background above, this study will discuss and explore about the legal position of land banks after the constitutional court ruling and explore about the existence of Customary Land after the existence of the Land Bank Institution in Law Number 64 of 2021 concerning Job Creation.

## METHODS

This research was normative legal research in which normative legal research is a step to find a rule of law, legal principles and legal doctrines to answer the legal issues faced (Marzuki, 2013). The research approach used was a statue approach and a conceptual approach.

The types and sources of legal materials in this study include primary, secondary and tertiary legal materials. The primary legal material was in the form of statutory regulations related to the Land Bank, namely:

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Law Number 5 of 1960 concerning Basic Agrarian Regulations;
- c. Government Regulation Number 64 of 2021 concerning Land Banks;
- d. Law Number 11 of 2020 Concerning Job Creation;
- e. Law Number 22 of 2019 concerning the Sustainable Agricultural Culture System;
- f. Law Number 2 of 2012 concerning Land Procurement for Development in the Public Interest;
- g. Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 5 of 1999 concerning Guidelines for Settlement of Indigenous Peoples' Customary Rights Issues;
- h. Law 12 of 2011 concerning Formation of Legislation;
- i. Constitutional Court Decision Number 91/PUU-XVIII/2020.

Meanwhile, secondary legal materials in this study were in the form of library materials, journals, and online articles, while tertiary legal materials include legal materials that provide instructions for primary and secondary legal materials, such as legal dictionaries and others.

## RESULTS AND DISCUSSION

### Legal Position of Land Banks After the Constitutional Court Ruling

One of the main goals of the state as stated in Pancasila, namely the second precept, namely a just and civilized humanity and the fifth precept, namely social justice for all Indonesian people, is to create a just society and realize social justice for all Indonesian people (Hutabarat et al., 2022). Social justice for all people can only be achieved by increasing social welfare. While social welfare itself can be achieved if this country has legal institutions that fulfill the elements of legal ideals in the form of justice, legal certainty and legal benefits (Limbong, 2013).

In the Indonesian context, land bank entities are based on Article 33 of the 1945 Constitution and Law Number 5 of 1960 concerning Basic Agrarian Regulations (BAL). As for Article 33 of the 1945 Constitution reads:

- 1) The economy is structured as a joint venture based on the principle of kinship.
- 2) The branches of production which are important to the state and affect the livelihood of the people at large are controlled by the state.
- 3) Earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people.
- 4) The national economy is organized based on economic democracy with the principles of togetherness, fair efficiency, sustainability, environmental awareness, independence, and by maintaining a balance of progress and national economic unity.
- 5) Further provisions regarding this article are regulated in the Law.

Juridically, the regulation of land banks in Indonesia began with the issuance of the Job Creation Law which was ratified on November 2 2020. The arrangements regarding land banks in the Job Creation Law are contained in 10 articles, starting with article 125 which contains an explanation and functions to be carried out by a land bank, then article 26 which explains the nature of a land bank which guarantees the availability of land for the community, then continued with article 27 which outlines the implementation of the duties of a land bank that is transparent, accountable and non-profit oriented, and articles 128-129 which contain provisions

land bank assets, management of land rights and land bank organizations while articles 130-135 contain an explanation of each organization in the land bank (Lahilote et al., 2021). It is hoped that the enactment of articles on land banks will be effective in land regulation in Indonesia. However, in its journey there have been several requests for review of the Job Creation Law against the 1945 Constitution which were submitted to the Constitutional Court of the Republic of Indonesia, and after going through several hearings on November 25 2021, the Constitutional Court handed down a decision on the case for formal review of Law Number 11 of the Year 2020 concerning Job Creation.

In the Constitutional Court Decision No. 91/PUU-XVIII/2020, stated Law No. 11 of 2020 concerning Job Creation was declared formally flawed (Lahilote et al., 2021). The implications of the Constitutional Court's Decision on the Job Creation Law are contained in the ruling which is explained as follows:

- a. Declare the formation of Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditionally binding legal force as long as does not mean “no improvement is made within 2 (two) years since this decision was pronounced”;
- b. Declare Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to State Gazette of the Republic of Indonesia Number 6573) is still valid until repairs are made in accordance with the time limit specified in this decision;
- c. Instruct the legislators to make improvements within a maximum period of 2 (two) years from the pronouncement of this decision and if corrections are not made within that time limit, then Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) becomes permanently unconstitutional;
- d. Stating that if within a period of 2 (two) years the legislator cannot complete the amendment to Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) then the law or articles or content of laws that have been revoked or amended by Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to State Gazette of the Republic of Indonesia Number 6573) is declared valid again;
- e. Declare to suspend all actions/policies that are strategic in nature and have broad implications, and it is also not justified to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573).

The government is ordered to make improvements within a maximum period of 2 (two) years and if within that period no corrections are made, the Job Creation Law will become permanently unconstitutional. In addition, all actions or policies that are strategic in nature and have broad implications are also suspended, and it is also not justified to issue new implementing regulations relating to the Job Creation Law. Previously, Article 135 of the Job Creation Law stated that: “Further provisions regarding the establishment of a land bank entity are regulated in a Government Regulation”. Thus, Government Regulation Number 64 of 2021 concerning the Land Bank Agency was formed to regulate more specific provisions related to the Land Bank Agency, then issued Presidential Decree No. 113 of 2021 concerning the structure and administration of the Land Bank (Perpres Bank Tanah) which is the implementing regulation of the Regulation. the government.

The issuance of Government Regulation Number 64 of 2021 concerning Land Bank Bodies and the Perpres of Land Banks allegedly violated the ruling of Constitutional Court

Decision Number 91/PUU XVIII/2021 point 7 which reads:

“Declaring to suspend all actions/policies that are strategic in nature and have broad implications, and it is also not justified to issue new implementing regulations relating to Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Indonesia Number 6573)”.

In legal theory, if the proposed review is a judicial review and the decision states that the article is contrary to the 1945 Constitution, then only the article being tested is declared to have no binding legal force, in other words the article is null and void. Meanwhile, if the proposed review is a formal test and the decision states that the formation of the law is contrary to the 1945 Constitution, then the law and all the materials or articles contained therein must be declared to have binding legal force, in other words the law is null and void (Budiman, 2021).

The decision of the Constitutional Court stated that the Job Creation Law is conditionally unconstitutional with the provision that reforms must be made within two years.

The decision letter (a) regarding the binding power of a law, confirms that the Job Creation Law is no longer valid from 25 November 2021 until after it has been reformed both formally and substantially in accordance with the order of the Constitutional Court. Furthermore, letter (b) must be understood as the effectiveness of the Job Creation Law, each law that is passed can only take effect and be generally binding if it is promulgated in the State Gazette. Thus, the Job Creation Law had both validity and binding power when it was ratified by the President on November 2, 2020, but no longer has binding force since it was decided to be formally disabled by the Constitutional Court on November 25, 2021 (Windyantoro & Simangunsong, 2022). Third, the decision letter (c) confirms that the Job Creation Law will be permanently unconstitutional if within 2 (two) years no corrections are made by the legislator. Fourth, the decision letter (d) states that if repairs are not carried out within 2 (two) years, then the law or articles or content of the law that has been revoked or amended by Law Number 11 of 2020 concerning Job Creation, declared valid again. Fifth, the decision letter (e), regarding the order to suspend all actions or policies that are strategic and have broad impact (Windyantoro & Simangunsong, 2022).

One of the strategic policies according to Article 4 of the Job Creation Law is one that is included in the land acquisition cluster. The cluster includes arrangements regarding land acquisition, strengthening of Management Rights (HPL), and the Land Bank. With the Constitutional Court Ruling, especially in letter (e), all actions or policies relating to these three fields, both contained in the Job Creation Law and its implementing regulations, are in the form of Government Regulations, Presidential Regulations, and under other regulations which must be suspended from its application until the revision of the Job Creation Law is completed because it does not have binding force (Windyantoro & Simangunsong, 2022). The formation of the Job Creation Law must be carried out by fulfilling the formal and material requirements for the formation of the Law and involving the public in the maximum and meaningful way according to the Ruling of the Constitutional Court (Pandamdari, 2022).

### **Existence of Customary Land after the existence of the Land Bank Institution in Law Number 64 of 2021 Job Creation**

Customary rights are a central point in the life of indigenous peoples. Customary rights arise because of a legal relationship between indigenous peoples (as the subject) and customary (as the object) so as to give birth to the authority for the subject to carry out legal actions. These powers include: (1) regulating their use; (2) regulate and determine the legal relationship between the person and the customary area; (3) and also regulates and determines the legal relationship between people and legal actions related to the customary law. Customary land

includes the scope of customary rights (Sembiring, 2018).

The definition of indigenous peoples from a juridical perspective is contained in several laws and regulations such as the Job Creation Law and Law Number 39 of 2014 concerning Plantations. Indigenous peoples are a group of people who have traditionally settled in certain geographical areas in the Unitary State of the Republic of Indonesia due to ties to ancestral origins, strong ties to land, territory, natural resources, having customary government institutions and customary law orders in their customary territories in accordance with the provisions of laws and regulations.

Whereas in Law Number 32 of 2009 concerning Environmental Protection and Management, that customary law communities are groups of people who have lived in certain geographic areas for generations because of ties to ancestral origins, a strong relationship with the environment, and the existence of the value system that determines economic, political, social and legal institutions.

Explanation from Ter Haar that there are 3 factors that determine customary law communities, namely: (Cahyaningrum, 2022)

- 1) Territorial factors formed due to the presence of a sense of attachment between people and the territory they occupy;
- 2) Geneological factors formed because members of indigenous peoples come from one descent or breed;
- 3) Mixed factors formed due to a combination of territorial factors and geneological factors.

The essence of the concept of customary rights is emphasized on the relationship between the community and the land or natural resources it owns. The concept was born from natural rights. Regarding customary land arrangements, this raises the question of whether the authority is public or private. Observing the BAL, Article 2 paragraph (4) places customary rights as rights with a public character (Cahyaningrum, 2022), that "The above-mentioned state control rights can be delegated to autonomous regions and customary law communities, only necessary and not contrary to national interests, according to the provisions of government regulations".

In Article 2 paragraph (4) it emphasizes that the right to control the state is a right that has a public character, which can be delegated to customary law communities, although there is no explanation as to what is being empowered. born from the right to control the state as stated in the BAL Article 2 paragraph (2).

According to Boedi Harsono, the meaning of customary law community customary rights is a series of authorities and obligations of a customary law community, which relates to land located within their territory (Harsono, 2005).

This customary land is regulated in the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency Number 5 of 1999 concerning Guidelines for the Settlement of Customary Rights Problems of Customary Law Communities, in Article 1 paragraph (2) that "Customary Land is a parcel of land on which there are customary rights from a community certain customary law.

And regarding control over land parcels it is regulated in Article 4 paragraph (1) which contains "Control of land parcels including communal land as referred to in Article 2 by individuals and legal entities can be carried out: a. By members of the customary law community concerned with tenure rights according to the applicable provisions of customary law, which if desired by the right holders can be registered as land rights according to the provisions of the BAL; b. By government agencies, legal entities or individuals who are not members of the customary law community concerned with land rights according to the provisions of the BAL based on the granting of rights from the state after the land is released by the customary law community or by its citizens in accordance with the provisions and procedures of the applicable customary law.

Regarding customary land, this is also regulated in Law Number 5 of 1960 concerning



Basic Agrarian Regulations, which is stated in Article 3, that "With the provisions in Articles 1 and 2 of implementation of customary rights and similar rights Therefore, customary law communities, as long as in reality they still exist, must be in such a way as to comply with national and state interests, which are based on national unity and may not conflict with laws and other higher regulations.

Looking at the contents of Article 3, it seems as if there are two sides, there are those who acknowledge the existence of customary law which applies as a norm and at the same time fulfills the development of the modernization of a society. There is also a side that seems to be restricted by land law because it represents more of the interests of the authorities.

Because of this, the recognition of indigenous peoples' rights and access to natural resources (land) is also recognized internationally, as in the ILO (International Labor Organization) Convention No. 169 concerning Indigenous Peoples and Indigenous Peoples in Independent Countries which came into force on 5 September 1991, stipulates that the government is obliged to respect the culture and spiritual values of indigenous peoples who are upheld in their relationship with the land they occupy or use (Ismi, 2012).

Land or land on which there are customary rights and which have a relationship between land relations and customary law communities, must also continue to be used to improve the welfare of the community, by seeking prior approval from the indigenous peoples.

Regarding the request from applicant V and applicant VI as chairman of the customary court association, regarding the sound of article 22 of the Job Creation Law which changes the provisions of Law Number 22 of 2019 concerning the Sustainable Agricultural Culture System, Article 22 which states:

(1) Entrepreneurs who use customary rights lands who do not conduct consultations with customary law communities holding customary rights to obtain approval are subject to administrative sanctions in the form of:

- a. Temporary suspension of activities;
- b. Imposition of administrative fines;
- c. Government coercion;
- d. Freezing of business licenses;
- e. Revocation of business license.

(2) Further provisions regarding the criteria, types, amount of fines, and procedures for imposing administrative sanctions as referred to in paragraph (1) are regulated in a Government Regulation.

And then regarding the norms in Article 111 in the Job Creation Law it was abolished. Meanwhile, the norm in Article 22 of Law Number 22 of 2019 states:

"In the case of land use in a certain area as referred to in Article 21 paragraph (1) carried out by Business Actors on customary land, the business actor is obliged to hold deliberations with the customary law community holding customary rights to obtain approval."

Then in Article 111 of Law Number 22 of 2019, that:

"Business actors who use customary land rights and do not hold consultations with the customary law community holding customary rights to obtain approval as referred to in Article 22, are subject to imprisonment for a maximum of 7 (seven) years and a maximum fine of Rp. 5.000.000.000,00 (five billion rupiah)."

Eliminating criminal sanctions and changing them with administrative sanctions will certainly cause a lot of grabbing of customary land which will occur arbitrarily. And also the applicants did not receive any information regarding the abolition of the criminal sanction, which means that it was not open/non-participatory in the formation of this Job Creation Law.

Therefore, the Job Creation Law is deemed to have violated the principle of clarity of formulation, the principle of openness and also the principle of usability and effectiveness. The

purpose of the principle of clarity of formulation is contained in the elucidation of Article 5 letter f of Law 12 of 2011 Concerning the Formation of Legislation, that every statutory regulation must meet the technical requirements for the preparation of statutory regulations, systematics, choice of words or terms, as well as legal language that is clear and easy to understand so as not to give rise to various kinds of interpretations in its implementation.

Regarding the principle of openness, as explained by the principle of clarity of the formulation which has been regulated in Article 5 letter f of Law Number 12 of 2011, that in the formation of laws and regulations starting from planning, drafting, discussing, validating or stipulating and promulgating transparent and open. Thus all layers of society have the opportunity to provide input and the formation of these laws and regulations.

However, in this case, Applicant V and Applicant VI did not receive any information regarding this matter. Which means it really violates the principle of openness. Although, not all discussions are carried out openly, but at certain points above, it must still be carried out in a transparent and open manner.

Regarding the violation of the principle of usability and effectiveness, as stated in Article 5 letter e of Law 12 of 2011, every statutory regulation is made to regulate what is really needed and useful in regulating the life of society, nation and state. Meanwhile, if we review the Job Creation Law again, of course it is not clear and does not comply with the principles of usability and efficiency.

That this principle of usability and efficiency has been violated, can be proven in Law Number 22 of 2019 concerning the Sustainable Agricultural Culture System, which is contained in Article 22, stating that:

“In the case of land use in a certain area as referred to in Article 21 paragraph (1) carried out by Business Actors on customary land, the business actor is obliged to hold deliberations with the customary law community holding customary rights to obtain approval.”

Further, in Article 111 of Law Number 22 of 2019, that:

“Business actors who use customary land rights and do not hold consultations with the customary law community holding customary rights to obtain approval as referred to in Article 22, are subject to imprisonment for a maximum of 7 (seven) years and a maximum fine of Rp. 5.000.000.000,00 (five billion rupiah).”

Regarding the two articles above, the Job Creation Law was amended and deleted, as contained in Article 31 of the Job Creation Law which changed several provisions in Law Number 22 of 2019, where Article 22 changed to:

(1) Business actors who use customary land rights who do not hold consultations with customary law communities holding customary rights to obtain approval are subject to administrative sanctions in the form of:

- a. Temporary suspension of activities;
- b. Imposition of administrative fines;
- c. Government coercion;
- d. Freezing of business licenses;
- e. Revocation of business license.

(2) Further provisions regarding the criteria, types, amount of fines, and procedures for imposing administrative sanctions as referred to in paragraph (1) are regulated in a Government Regulation.

Against the evidence of amendments to Article 22 and Article 111 which were abolished, of course it will not provide usability and effectiveness, especially in protecting customary law community land rights. Because the new provisions in the Job Creation Law do not create a deterrent effect for business actors, due to the heaviest administrative sanctions, namely revocation of licenses. This does not create a deterrent effect, because business actors only need to take care of new business permits, so that they can again make efforts to take customary land rights of indigenous peoples.

On the other hand, indigenous peoples are unable to pursue criminal law remedies for usurpers of indigenous peoples' customary land rights. Precisely something like this will lead to conflict between business actors who control the land and the community holding customary rights over the land. Because of this, there are pros and cons regarding this Job Creation Law, especially indigenous peoples, who feel very disadvantaged.

Regarding the existence of customary land rules after the existence of the Job Creation Law, if examined in more depth, the government made breakthroughs in spatial planning, land acquisition for infrastructure development, spatial planning and land control as in the Job Creation Law introducing the Land Bank. The establishment of a Land Bank is supported by Government Regulation (PP) Number 64 of 2021 concerning Land Bank Agencies.

Customary land that is used, exploited and managed by customary law communities over time is also used by business actors as land for their business. Previously regulated in Law Number 22 of 2019 concerning the Sustainable Agricultural Culture System where, the business actor must obtain approval from the indigenous people which is obtained by joint deliberation, if they do not obtain approval for the customary land they can be subject to several administrative sanctions regulated in the Act.

However, after the repeal of Law Number 22 of 2019 and replaced with Law Number 64 of 2021 Concerning Job Creation, this is not regulated in the Job Creation Law so that there is a possibility that if business actors want to use communal land they do not need to obtain approval through deliberations from indigenous peoples who are responsible for the customary land. Hence, the rights to use and manage customary land can be reduced or lost due to the use of customary land by outsiders who do not need the approval of indigenous peoples which can cause harm to the indigenous peoples themselves.

This raises the pros and cons. Where is the emergence of Government Regulation Number 64 of 2021 concerning the Land Bank Agency as a follow-up to the fourth part of Land Affairs Article 135 of the Job Creation Law which contains: Further provisions regarding the formation of a Land Bank Agency are regulated in a Government Regulation. Whereas in the Decision of the Constitutional Court (MK) Number 91/PUU-XVIII/2020 point 7 that "Declares to suspend all actions/policies that are strategic and have broad impact, and it is also not justified to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, additional Sheet of the Republic of Indonesia Number 6573)." Therefore, this is suspected of violating the Constitutional Court Decision.

Likewise, in points 4 and 5 it states that "Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573), is still valid until repairs are made in accordance with the grace period as stipulated in this decision." Also in point 5 "Orders legislators to make improvements within a maximum period of 2 years from the pronouncement of this decision and if within this time period no corrections are made, then Law Number 11 of 2020 concerning Job Creation (State Gazette of the Republic of Indonesia) Indonesia of 2020 Number 245, Supplement to the State Gazette of the Republic of Indonesia Number 6573) becomes permanently unconstitutional."

Because the Constitutional Court Decision Number 91/PUU-XVIII/2020 ruled that this Job Creation Law must be amended within a period of 2 years, so for now, especially regarding communal land, the old law is being used, namely Law Number 22 of 2019 concerning the Sustainable Agricultural Culture System, which in Article 22 and Article 111 regulates criminal sanctions if business actors using customary land rights do not hold consultations with customary leaders and also customary land owners.

## CONCLUSION

The Land Bank Agency, hereinafter referred to as the Land Bank, is a special agency (*sui generis*) which is an Indonesian legal entity established by the central government which is given special authority to manage land. The regulation of land banks in Indonesia began with the issuance of the Job Creation Law which was passed on November 2 2020. Then the implementing regulations for this Job Creation Law were formed, namely Government Regulation Number 64 of 2021 concerning Land Bank Agencies (PP Land Bank) which was passed on April 29 2021 and Presidential Decree No. 113 of 2021 concerning the structure and administration of Land Banks (Perpres Bank Land) which was ratified on December 27 2021. However, In its journey, several requests for review of the Job Creation Law against the 1945 Constitution have been submitted to the Constitutional Court of the Republic of Indonesia and on November 25 2021, the Constitutional Court handed down a decision on the case for formal review of Law Number 11 of 2020 concerning Job Creation. With this decision, the Government is ordered to make improvements within a maximum period of 2 (two) years and if within that period no corrections are made, the Job Creation Law will become permanently unconstitutional. In addition, all actions or policies that are strategic in nature and have broad implications are also suspended, and it is also not justified to issue new implementing regulations relating to the Job Creation Law. Thus, the Job Creation Law is still valid until it is amended no later than 2 (two) years after the Constitutional Court reads its Decision, but both Government Regulation Number 64 of 2021 concerning the Land Bank Agency or Presidential Decree No.113 of 2021 regarding the structure and operation of the Land Bank its implementation must be suspended until the revision of the Job Creation Law is completed because it does not have binding legal force. Therefore, it is necessary to immediately make improvements to the Job Creation Law so that it is in line with the BAL.

Decision of the Constitutional Court Number 91/PUU-XVIII/2020 ruled that this Job Creation Law must be amended within a period of 2 years, so for now, especially regarding communal land, what is used is the old Law, namely the Law Law Number 22 of 2019 concerning the Sustainable Agricultural Culture System, which in Article 22 and Article 111 stipulates criminal sanctions if business actors using customary land rights do not hold consultations with customary leaders or the owner of the customary land rights.

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